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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 GENGHIS KHAN ALI STEVENSON,
12 CDCR # P-46050

13 Plaintiff,

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15 vs.
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18 RYAN THOMAS HARMON, Correctional
19 Officer; JOHN DOE,

20 Defendants.
21
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Civil No. 10cv2663 JLS (JMA)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE AND GARNISHING
\$350.00 BALANCE FROM
PRISONER TRUST ACCOUNT
[Doc. No. 2];**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[Doc. No. 3] AND**

**(3) DISMISSING ACTION FOR
SEEKING MONETARY DAMAGES
AGAINST DEFENDANTS WHO ARE
IMMUNE PURSUANT
TO 28 U.S.C. §§ 1915(e)(2)(B)
& 1915A(b)**

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24 Plaintiff, a state inmate currently incarcerated at Kern Valley State Prison located in
25 Delano, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42
26 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a);
27 instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C.
28 § 1915(a) [Doc. No. 2], along with a Motion for Appointment of Counsel [Doc. No. 3]

I.

MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 3]

Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

The Court denies Plaintiff’s request without prejudice, as neither the interests of justice nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

II.

MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a party’s failure to pay only if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

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1 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
 2 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement
 3 shows that he has insufficient funds from which to pay an initial partial filing fee.

4 Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 2] and
 5 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further
 6 orders the Secretary of the California Department of Corrections and Rehabilitation ("CDCR")
 7 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them
 8 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 9 § 1915(b)(1).

10 III.

11 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

12 The Prison Litigation Reform Act ("PLRA")'s amendments to 28 U.S.C. § 1915 also
 13 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like
 14 Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or
 15 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
 16 probation, pretrial release, or diversionary program," "as soon as practicable after docketing."
 17 See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua
 18 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,
 19 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 20 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 21 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.
 22 2000) (§ 1915A).

23 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 24 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28
 25 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner's suit
 26 make and rule on its own motion to dismiss before directing that the Complaint be served by the
 27 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 ("[S]ection 1915(e) not only permits,
 28 but requires a district court to dismiss an in forma pauperis complaint that fails to state a

claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing § 1915A).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). Here, however, even presuming Plaintiff’s factual allegations true, the Court finds his Complaint both fails to state a claim upon which relief can be granted and seeks monetary relief from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1.

In Plaintiff’s Complaint, he seeks to hold Defendant Harmon liable for “malicious prosecution” arising from a criminal proceeding in Imperial County Superior Court wherein Plaintiff was indicted for “battery on a non-confined person by prisoner.” (Compl. at 6.) Plaintiff was charged with this crime by he later received a dismissal of all the charges. (*Id.*) Plaintiff also alleges that he brought a civil action against Defendant Harmon for the incident that gave rise to the criminal charges. (*Id.*) Plaintiff alleges that Defendant Harmon perjured himself while giving grand jury testimony and fabricated reports with regard to the alleged incident. (*Id.* at 4-6.)

First, to the extent that Plaintiff seeks monetary damages from Defendant Harmon, a witness during his criminal trial, for allegedly committing perjury, Defendant Harmon is absolutely immune. *See* 28 U.S.C. § 1915(e)(2)(b)(iii); § 1915A(b)(2). “Witnesses, including police witnesses, are immune from liability for their testimony in earlier proceedings even if they committed perjury.” *Paine v. City of Lompoc*, 965 F.3d 975, 981 (9th Cir. 2001) (citing *Briscoe v. LaHue*, 460 U.S. 325, 345 (1983)). “Witness immunity also extends to conspiracies to commit perjury.” *Id.* (citing *Franklin v. Terr*, 201 F.3d 1098, 1101-02 (9th Cir. 2000)). *See also Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (witnesses are absolutely immune from suits for damages under 42 U.S.C. § 1983 for testimony given at trial, or for testimony given during adversarial pretrial proceedings); *Demoran v. Witt*, 781 F.2d 155, 157-58 (9th Cir. 1986).

1 Thus, the claims against Defendant Harmon must be dismissed for seeking monetary
2 damages against an immune Defendant.

3 Accordingly, the Court finds that Plaintiff's entire Complaint must be dismissed for
4 seeking monetary damages against immune defendants pursuant to 28 U.S.C. §§ 1915(e)(2)(B)
5 and 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1. If Plaintiff
6 chooses to file an Amended Complaint, he is cautioned that he may not re-allege any claims that
7 arose in *Stevenson v. Harmon, et al.*, S.D. Cal. Civil Case No. 07cv0277 W (PCL). This Court
8 takes judicial notice that Defendant Harmon's Motion for Summary Judgment as to Plaintiff's
9 excessive force claims was granted in that matter and the Court's ruling was later affirmed by
10 the Ninth Circuit Court of Appeals.

11 IV.

12 CONCLUSION AND ORDER

13 Good cause appearing, **IT IS HEREBY ORDERED:**

14 1. Plaintiff's Motion to Appoint Counsel is **DENIED** [Doc. No. 3].

15 2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
16 **GRANTED.**

17 3. The Secretary of California Department of Corrections and Rehabilitation, or his
18 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
19 owed in this case by collecting monthly payments from the account in an amount equal to twenty
20 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
21 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
22 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
23 **ASSIGNED TO THIS ACTION.**

24 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
25 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
26 Sacramento, California 95814.

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